1999

State of Utah v. Patrick E. Eberwein : Brief of Appellant

Utah Court of Appeals

Mary-Kathleen Wolsey; Deputy County Attorney; Attorney for Respondent.
Floyd W. Holm; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	Case No. 990775
vs.	)	
	)	
PATRICK E. EBERWEIN,	)	Classification Priority 2
	)	
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Appeal from the Judgment of the Fifth Judicial District Court in and for Iron County, State of Utah, with the Honorable Robert T. Braithwaite, District Judge, presiding.

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JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter because it is an appeal from a court of record in a criminal case not involving a conviction of a first-degree or capital felony. Utah Code Ann. §78-2a-3(2)(e)(1996).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The sole issue for review is whether there was sufficient evidence to convict Defendant of the offense of driving with a measurable controlled substance in his body?

In its review of the lower court's decision, this Court must sustain the trial court's judgment unless it is "against the clear weight of the evidence or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. Spanish Fork City v. Bryan, 975 P.2d 501, 502 (Utah Ct. App. 1999). The trial court's verdict should be upheld if it is "supported by a quantum of evidence concerning each element of the crime that is charged from

which the court may base its conclusion of guilty beyond a reasonable doubt." State v. Murphy, 617 P.2d 399, 402 (Utah 1980). In arguing insufficiency of the evidence, Defendant must marshal all evidence in support of the verdict. State v. Benvenuto, 983 P.2d 556, 558 (Utah 1999).

The above stated issue was preserved in Defendant counsel's closing argument to the effect that there was no evidence that Defendant had a measurable controlled substance in his body or the specific drug was not prescribed. (R. 49 at 14).

TEXT OF AUTHORITIES

Section 41-6-44.6, Utah Code Annotated, 1953, as amended, is set forth verbatim in the addendum herein.

STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal case wherein Defendant was charged with driving with any measurable controlled substance in the body, a Class B Misdemeanor and Speeding, a Class C Misdemeanor.

B. Course of the Proceedings

Defendant pled not guilty to both charges and a bench trial on both charges was held on September 1, 1999.

C. Disposition in the Court Below

At the conclusion of trial, the judge entered a verdict of guilty to both charges and a

Sentence, Judgment and Commitment was entered by the court on the same date. (R. 40-41).[1]

D. Statement of Facts

On April 29, 1999, Defendant was stopped by Trooper Larry Orton for speeding in Iron County, Utah. Subsequent to the stop, the officer believed that the Defendant may have been impaired and performed a search of the vehicle. Although Trooper Orton located certain contraband and paraphernalia on the person of the passenger, one Dennis Jones, he did not locate any contraband on Defendant's person or in the vehicle. He did, however, locate two prescription tablets known as "Vicodin", which Defendant admitted that he had taken previously for pain related to recent dental work. No evidence was presented at trial or otherwise that the two Vicodin tablets were in fact a controlled substance or not prescribed to Defendant by his dentist. Trooper Orton stated on cross-examination that he "took [Defendant's] word for it that those had been prescribed as he indicated[.]" Moreover, no chemical test of any of Defendant's bodily fluids were performed by Trooper Orton or any other person to determine a level of any metabolite in Defendant's system. (R. 49, at 5-6, 8-13).

SUMMARY OF ARGUMENT

Even after a full marshaling of evidence in support of the verdict, there is not sufficient evidence to show that Vicodin was a controlled substance, that there was a measurable amount of

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[1] In this appeal, Defendant contests the sufficiency of the evidence only as to Count I, Driving with a Measurable Controlled Substance in the Body, not Count II, Speeding.

it or any other controlled substance in Defendant's body or that such drug was not prescribed by a practitioner.

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE OF SUPPORT THE COURT'S VERDICT OF GUILTY OF DRIVING WITH ANY MEASURABLE CONTROLLED SUBSTANCE IN THE BODY

Section 41-6-44.6 provides that in cases not amounting to violation of driving under the influence of drugs/alcohol, "a person may not operate or be in actual physical control of a motor vehicle within this state if the person has any measurable controlled substance or metabolite of a controlled substance in the person's body." Utah Code Ann. § 41-6-44.6(2)(1999). Defendant first challenges the sufficiency of evidence supporting that he had a "controlled substance in his body or, if it was a controlled substance, if he had any measurable amount of it or metabolite of it in his body. This court has previously held that it cannot uphold a conviction unless it is "'supported by a quantum of evidence concerning each element of the crime as charged from which the' fact finder 'may base its conclusion of guilty beyond a reasonable doubt.' In addition, a 'guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.'" Spanish Fork City v. Bryan, 975 P.2d 501, 502-03 (Utah Ct. App. 1999)(quoting State v. Murphy, 617 P.2d 399, 402 (Utah 1980) and State v. Workman, 852 P.2d 981, 985 (Utah 1993)).

In this case, even after fully marshaling the evidence, this court is left with only speculation as to whether Defendant is guilty. The evidence supporting the court's determination that Defendant had a measurable controlled substance or metabolite of a controlled substance in his body is as follows:

1. Trooper Orton believes that, based upon Defendant's speeding, the long time for him to stop his vehicle after the Trooper turning on his lights, the fact that the rental contract for the vehicle was for driving only in the State of California and some inconsistencies in the stories between Defendant and Jones he "was concerned that he might be under the influence of a controlled substance as well." (R. 49 at 9)

2. Defendant did not submit to a urine sample when requested. (Id. at 9-10)

3. Trooper Orton found two Vicodin tablets on Defendant's person which he determined to be a narcotic pain medication consistent with Lortab.[2] (Id. at 10-11)

4. Defendant admitted that he had been taking the Vicodin recently. (Id. at 12)

Even if this court were to accept Trooper Orton's hearsay testimony for the truth of the matter(i.e., that Vicodin is a narcotic pain medication), there is still insufficient evidence it is a "controlled substance under Section 58-37-4 of the Utah Code." See Utah Code Ann. § 41-6-44.6(1)(a)(1999). However, even if this court accepts the hearsay testimony and from that infers

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Defendant's counsel objected to Trooper Orton's testimony as to the properties of Vicodin on the grounds of hearsay. Although the court allowed the testimony, it was apparently only to show the Trooper's state of mind, not for the truth of the matter. Id. at 11.

that the Vicodin was, in fact a controlled substance, there is still no evidence whatsoever that there was any measurable amount of that or any other controlled substance in Defendant's body or any metabolite of that or any other controlled substance in his body. We are left with only the speculation of Trooper Orton that he "may" have had that substance in his body because of some of the facts and circumstances surrounding the incident.

Finally, even assuming that there is a sufficient quantum of evidence showing that a measurable controlled substance or metabolite thereof was in Defendant's system at the time of the traffic stop, there is no evidence whatsoever from the state to rebut Defendant's statement that it was a prescribed drug. Subsection (3) of Section 41-6-44.6 provides that it is an affirmative defense if the controlled substance was "prescribed by a practitioner for use by the accused." In the instant case, Trooper Orton admitted, on cross examination, that although Defendant did not have a prescription or the actual bottle that contained the Vicodin he "took his word for it that those had been prescribed as he indicated[.]" (R. 49 at 13). Moreover, Trooper Orton determined that it was not appropriate to charge Defendant with illegal possession of a controlled substance becaused he believe it had been prescribed. Id. at 12-13.[3]

Based the totality of the circumstances and all of the evidence that may even tangentially support the verdict, there simply is not sufficient evidence as to the crucial element of the crime

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[3]The state may argue that since Defendant did not appear at trial, he presented no "affirmative" evidence that the drug was prescribed; however, his statement to Trooper Orton did become part of the evidence and, to that extent, does constitute evidence that the drug was prescribed.

that Defendant had any "unprescribed" measurable controlled substance or metabolite of a controlled substance in his body.

CONCLUSION

Based upon the above discussion, this Court should reverse the judgment of the lower court as to Count I of the Information and, if necessary, remand for the entry of a judgment of acquittal as to Count I of the Information.

RESPECTFULLY SUBMITTED this 26th day of April, 2000.

FLOYD W HOLM
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2000, I caused to hand-delivered two (2) copies of the foregoing BRIEF OF APPELLANT to Ms. Mary-Kathleen Wolsey, Deputy Iron County Attorney, 97 North Main, Suite 1, Cedar City, Utah 84720.

FLOYD W HOLM

ADDENDUM

41-6-44.6. Definitions — Driving with any measurable controlled substance in the body — Penalties — Arrest without warrant.

(1) As used in this section

(a) "Controlled substance" means any substance scheduled under Section 58-37 4

(b) "Practitioner" has the same meaning as provided in Section 58-37-2

(c) "Prescribe" has the same meaning as provided in Section 58-37-2

(d) "Prescription" has the same meaning as provided in Section 58-37-2

(2) In cases not amounting to a violation of Section 41-6-44, a person may not operate or be in actual physical control of a motor vehicle within this state if the person has any measurable controlled substance or metabolite of a controlled substance in the person's body

(3) It is an affirmative defense to prosecution under this section that the controlled substance was involuntarily ingested by the accused or prescribed by a practitioner for use by the accused

(4) A person convicted of a violation of Subsection (2) is guilty of a class B misdemeanor

(5) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in the officer's presence, and if the officer has probable cause to believe that the violation was committed by the person

(6) The Driver License Division shall

(a) suspend, for 90 days, the driver license of a person convicted under Subsection (2),

(b) revoke, for one year, the driver license of a person convicted of a second or subsequent offense under Subsection (2) if the violation is committed within a period of six years after the date of the prior violation, and

(c) subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based

(7) The Driver License Division may not reinstate any license suspended or revoked as a result of a conviction under this section, until the convicted person has complied with the requirements of Subsection 41-6-44(7)(b)

FIFTH DISTRICT COURT- CEDAR COURT
IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES BENCH TRIAL SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 995500970 TC
PATRICK E EBERWEIN, Defendant.	:	Judge: ROBERT T BRAITHWAITE Date: September 1, 1999

PRESENT
Clerk:
Prosecutor: MARY-KATHLEEN WOLSEY
Defendant not present
Defendant's Attorney(s): FLOYD HOLM

DEFENDANT INFORMATION
Date of birth: January 12, 1960
Video
Tape Number: 090199 Tape Count: 134pm

CHARGES

1. DRIVE WITH MEASURABLE CONTROLLED SUBSTAN - Class B Misdemeanor
   Plea: Not Guilty - Disposition: 09/01/1999 Guilty
2. SPEEDING - Class C Misdemeanor
   Plea: Not Guilty - Disposition: 09/01/1999 Guilty

TRIAL

TAPE: 090199 COUNT: 134pm
On record, Atd Holm informs the Court he has attempted to phone the defendant today, was not able to speak with him and so is unsure why he is not present.
The Court orders the trial to proceed in his absence.
Atp Wolsey calls Trooper Larry W. Orton to the stand. The witness is sworn and testifies under direct examination of Atp Wolsey. Atd Holm accepts the profer in regard to count two, speeding.
COUNT: 144pm
The witness is subject to cross-examination.

Case No: 995500970
Date: Sep 01, 1999

The State rests.
Atp Holm calls no witnesses.
Atp Wolsey submits closing argument subject to rebuttal.
Atd Holm offers closing argument.
COUNT: 149pm
Atp Wolsey offers closing argument on rebuttal.
Counsel argue closing remarks back and forth.
The Court finds the defendant guilty on counts 1 and 2 and imposes sentence as follows:

SENTENCE JAIL

Based on the defendant's conviction of the following:
the defendant is sentenced to a term of 10 day(s) The total time suspended for this case is 10 day(s).

The jail term is suspended if the fine is paid in full.

Total Fine:	$1000.00
Total Suspended:	$0
Total Surcharge:	$453.03
Total Principal Due:	$1000.00
	Plus Interest

SENTENCE FINE PAYMENT NOTE

The fine is to be paid within six months.
Pay fine to The Court.

Dated this 1 day of September, 1999.

ROBERT T BRAITHWAITE
District Court Judge